IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 25, 2008 Session

BETTY ROSE v. COOKEVILLE REGIONAL MEDICAL CENTER, ET AL.

Appeal from the Circuit Court for Putnam County
No. 06J0186 John Turnbull, Judge

No. M2007-02368-COA-R3-CV - Filed May 14, 2008

This appeal arises from a claim for defamation brought by a terminated hospital employee against several parties, including a doctor who had allegedly made slanderous remarks about her work performance. The trial court granted the doctor's motion to dismiss for failure to state a claim under Tenn. R. Civ. P. 12. Following the trial court's dismissal of the case against the doctor, the plaintiff moved to alter or amend the order of dismissal and also moved for the trial judge's recusal due to an alleged business relationship between the judge's son and the defendant doctor. We agree that the complaint fails to state a claim for slander because it does not specify sufficiently the time and place of the alleged statements. We further conclude that the plaintiff's motion to recuse was properly denied. Accordingly, we affirm the trial court's dismissal and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded.

WALTER C. KURTZ, SR. J., delivered the opinion of the court, in which DAVID R. FARMER and HOLLY M. KIRBY, JJ., joined.

James L. Harris, Nashville, Tennessee, for the appellant, Betty Rose.

Daniel H. Rader, III, Cookeville, Tennessee, for the appellee, Jeffrey J. Gleason, M.D.

OPINION

I

This case is on appeal from the trial court's dismissal of the claims brought against the appellee, Dr. Jeffrey J. Gleason. On June 12, 2006, the appellant, Ms. Betty Rose, filed suit against the Cookeville Regional Medical Center, Dr. Gleason, and Tina Ayers. Ms. Rose alleged that Dr. Gleason and Ms. Ayers had made disparaging remarks about her work performance and that these remarks rose to the level of defamation.

According to the complaint, Ms. Rose had worked at the Cookeville Regional Medical Center as a pediatric nurse and, she says, these comments resulted in her being terminated. Specifically as to Dr. Gleason, the complaint reads as follows:

> Commencing in the spring of 2005, Gleason made remarks to both patients and co-workers at [Cookeville Regional Medical Center] to the effect that Plaintiff was not competent at her job, that she should not be allowed to see patients, and that he would not allow his patients to interact with Plaintiff. Gleason engaged in a continuing course of conduct thus defaming Plaintiff until Plaintiff's employment at [Cookeville Regional Medical Center] was terminated in April of 2006.

Dr. Gleason moved to dismiss, contending that this allegation failed to state a claim upon which relief could be granted. More particularly, he asserted that the complaint did "not specifically allege what [Dr. Gleason] is alleged to have said, to whom said alleged defamatory statements were made, and when said defamatory statements were made."

By its order of August 2, 2007 the trial court granted Dr. Gleason's motion and dismissed the case against him "with full prejudice." On August 13, 2007, Ms. Rose moved the trial court to alter or amend its order of dismissal. The motion simply reargued the issue previously raised, but for the first time she requested that the trial judge recuse himself. Ms. Rose said in an attached affidavit that she had "learned" (when is not clear) that Dr. Gleason and the judge's son are "co-owners [of a business named] the Upper Cumberland Physicians Surgery Center along with other individuals."

The trial court ruled on the motion by an order dated September 4, 2007:

> The Court specifically acknowledges that at the time he dismissed this case he was unaware of any alleged business relationship between his son and Dr. Jeffrey J. Gleason. The Court further finds that even if the relationship exists, it does not create a conflict of interest or necessitate his recusal. The Court has no relationship whatever with Dr. Gleason or OBGYN Associates, Inc.
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> The Court further finds that it offered the Plaintiff's attorney several opportunities to amend the Complaint at the hearing in this matter of July 27, 2007, but Plaintiff's counsel specifically declined to do so and has not proffered any amendment with the most recent Motion.
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> After reviewing the Court record[,] the file[,] and the authorities previously submitted, the Court finds that the Motion filed on behalf of the Plaintiff is not well taken and should be overruled.

Ms. Rose appeals from the trial court's ruling. She contends that the trial judge committed error in not recusing himself and also in dismissing the case as to Dr. Gleason.

II

We will first address Ms. Rose's argument that the trial judge should have recused himself. "Unless the grounds for recusal fall within those enumerated in Tenn. Const. art. 6, § 11 or T.C.A. § 17-2-101 (1994), the [trial judge's] refusal to recuse is reviewed as an abuse of discretion." *Wright v. Pate*, 117 S.W.3d 774, 779 (Tenn. Ct. App. 2002) (citation omitted); *see Caudill v. Foley*, 21 S.W.3d 203, 214-15 (Tenn. Ct. App. 1999) (citations omitted). "It is well settled in Tennessee that the question of recusal rests in the sound discretion of the trial judge and should not be reversed on appeal unless the record reveals a clear abuse of that discretion." *Irvin v. Johnson*, No. 01-A-01-9708-CV-00427, 1998 WL 382200, at *2 (Tenn. Ct. App. July 10, 1998) (citing *State, ex rel. Phillips v. Henderson*, 220 Tenn. 701, 423 S.W.2d 489 (1968)), *perm. app. denied* (Tenn. Dec. 7, 1998); *see Moody v. Hutchison*, 247 S.W.3d 187, 201-02 (Tenn. Ct. App. 2007).

Moreover, a judge should not decide to recuse unless a recusal is truly called for under the circumstances. As aptly stated by one federal judge: "[T]he issue with respect to recusal is not the convenience of the judge, who should agree to recusal only when it is truly required to do so. A judge has as much of a duty not to recuse himself absent a factual basis for doing so as he does to step aside when recusal is warranted." *Mass v. McClenahan*, No. 93 Civ. 3290 (JSM), 1995 WL 106106, at *1 (S.D.N.Y. Mar. 9, 1995) (citations omitted). "[D]isqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality. Were less required, a judge could abdicate in difficult cases at the mere sound of controversy or a litigant could avoid adverse decisions by alleging the slightest of factual bases for bias." *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981); *see In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1315 (2d Cir. 1988) ("[T]he price of avoiding any hint of impropriety, no matter how evanescent, would grant litigants the power to veto the assignment of judges.").

Ms. Rose's argument regarding the recusal of the trial judge fails for several reasons. First, the judge stated unequivocally that he was unaware of any relationship between his son and Dr. Gleason. Furthermore, the record does not support an affirmative finding that such a relationship exists, nor does it provide any meaningful details regarding the alleged relationship. *See Davis v. Tennessee Dep't of Employment Sec.*, 23 S.W.3d 304, 313 (Tenn. Ct. App. 1999) ("Parties who challenge a judge's impartiality must come forward with some evidence that would prompt a reasonable, disinterested person to believe that the judge's impartiality might reasonably be questioned.").

Even on the merits, the motion to recuse was not well taken. "[W]here an interest is not direct, but is remote, contingent, or speculative, it is not the kind of interest which reasonably brings into question a judge's impartiality." *United States v. Morrison*, 153 F.3d 34, 48 (2d Cir. 1998) (citations omitted); *cf. Gillispie v. City of Knoxville*, No. E2005-01353-COA-R3-CV, 2006 WL 1005155, at *6-9 (Tenn. Ct. App. Apr. 18, 2006) (holding that, while son of trial judge was a Knox County deputy sheriff, this was alone insufficient to create a reasonable question of impartiality in case involving allegedly tortious conduct of City of Knoxville police officers). For instance, it is widely accepted that, standing alone, an employment relationship between a judge's child and a party does not itself necessarily require the judge's recusal. *See, e.g., Taylor v. Vermont Dep't of*

Educ., 313 F.3d 768, 795 (2d Cir. 2002) ("The fact that a judge's offspring is employed by a party does not require recusal *per se*.") (citing several federal cases). Likewise, we believe the mere fact that the judge's son and a party "along with other individuals" may have been co-owners of a business—a business which was not a party to the litigation—is not itself sufficient to have required the judge to recuse himself.

Additionally, Ms. Rose's affidavit does not state any reason why she did not bring this to the court's attention prior to its ruling against her. A party cannot manipulate the process by failing to move promptly for a judge's recusal, waiting instead until after it has received an unfavorable decision. *Davis*, 23 S.W.3d at 313; *Kinnard v. Kinnard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998). Therefore, the motion to recuse would also fail as being untimely.

III

The allegation against Dr. Gleason is sparse. Before this Court, Dr. Gleason argues that the complaint fails for a number of reasons:

(1) The statements alleged are not defamatory as a matter of law.
(2) The statements alleged are privileged.
(3) There was no publication alleged by Ms. Rose in her complaint.
(4) The complaint's allegations related to the time and place of the statement's uttering are insufficient, especially given the six month statute of limitations.

The trial court did not state the reasons for its granting of the motion to dismiss. This Court is therefore at a disadvantage, but it will make the best of the record before it, which clearly indicates that the motion was granted under Tenn. R. Civ. P. 12.02(6).

A motion brought under Tenn. R. Civ. P. 12.02(6) tests "the sufficiency of the complaint, not the strength of the plaintiff's evidence." *Pendleton v. Mills*, 73 S.W.3d 115, 120 (Tenn. Ct. App. 2001) (citations omitted). "A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts." *Marceaux v. Thompson*, 212 S.W.3d 263, 267 (Tenn. Ct. App. 2006) (citations omitted). "In considering a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief." *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997) (citation omitted); *see Winchester v. Little*, 996 S.W.2d 818, 822 (Tenn. Ct. App. 1998) (citation omitted). "On appeal from an order granting a Tenn. R. Civ. P. 12.02(6) motion, we must likewise presume that the factual allegations in the complaint are true, and we must review the trial court's legal conclusions regarding the adequacy of the complaint without a presumption of correctness." *Marceaux*, 212 S.W.3d at 267 (citations omitted); *see League Cent. Credit Union v. Mottern*, 660 S.W.2d 787, 789 (Tenn. Ct. App. 1983).

The law of defamation has been well explained by Tennessee courts:

> Libel is written defamation and slander is spoken defamation. *Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc.*, 876 S.W.2d 818, 820 (Tenn. 1994). "The basis for an action for defamation, whether it be slander or libel, is that the defamation has resulted in an injury to the person's character and reputation." *Davis v. The Tennessean*, 83 S.W.3d 125, 128 (Tenn. Ct. App. 2001)[;] *Quality Auto Parts*, 876 S.W.2d at 820.
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> Our Supreme Court has described the elements necessary to establish a prima facie case of defamation as follows: "the plaintiff must prove that (1) a party published a statement; (2) with knowledge that the statement was false and defaming to the other; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement." *Sullivan v. Baptist Memorial Hospital*, 995 S.W.2d 569, 571 (Tenn. 1999).

Kersey v. Wilson, No. M2005-02106-COA-R3-CV, 2006 WL 3952899, at *3 (Tenn. Ct. App. Dec. 29, 2006), *perm. app. denied* (Tenn. Apr. 16, 2007 and Apr. 23, 2007), *cert. denied*, 128 S. Ct. 285, 169 L. Ed. 2d 150 (2007).

This Court is of the opinion that the allegation of slander against Dr. Gleason is not well pled and is, on its face, violative of the six month statute of limitations. *See* Tenn. Code Ann. § 28-3-103. At common law, a complaint for slander had to set out the exact language of the defamatory statement. *See Lackey v. Metro. Life Ins. Co.*, 26 Tenn. App. 564, 581, 174 S.W.2d 575, 582 (1943). With the adoption of the Rules of Civil Procedure, that requirement was relaxed, and the complaint was deemed valid if it set forth the substance of the slanderous statement. *Handley v. May*, 588 S.W.2d 772, 774-75 (Tenn. Ct. App. 1979). The *Handley* court, however, made clear that, in addition to the substance of the statement, a plaintiff must plead the "time and place of the utterance" so as to apprise the defendant "of the allegations that he must defend against." *Id.* at 775.

Subsequent to *Handley*, this requirement of "time and place" was enforced in the case of *Millsaps v. Millsaps*, 1989 WL 44840 (Tenn. Ct. App. May 3, 1989), *perm. app. denied* (Tenn. Sept. 5, 1989). This Court discussed this further as follows:

> The Chancellor dismissed the appellant's cause of action for slander against the Millsaps defendants holding that "slander must be pled with specificity relative to the exact words uttered, to whom those words were uttered and the date or dates upon which said words were uttered." The advent of modern pleading based on the Rules of Civil Procedure has abrogated the requirement of pleading the exact slanderous words; only the substance of such utterance is required. *Handley v. May*, 588 S.W.2d 772, 775 (Tenn. App. 1979). However, in order to put defendant on notice as to the allegations against which he must defend, the complaint must also allege the time and place of such utterance. *Id. See generally* 53 C.J.S., *Libel and Slander* §§ 128-147, pp. 210-227. The complaint in this case alleges the substance of the utterance but no mention of the time or place of the publication is made. Therefore the trial court correctly dismissed the cause of action for slander against the Millsaps defendants.

Id. at *6.

Ms. Rose contends that this rule does not apply in the instant case. She concedes that the remarks alleged in the "spring of 2005" are outside the six month statute of limitations, but she then argues that, since she alleges a "continuing course of conduct" lasting until April of 2006, she can rely on the continuing tort doctrine to fit within the limitations period.[1] Tennessee courts have never recognized a "continuing defamation." In fact, this Court has previously commented on the dubiousness of the very concept of a "continuing defamation." *Edmondson v. Church of God*, 1988 WL 123955, at *4 (Tenn. Ct. App. Nov. 23, 1988).

The Court has located cases in which the circumstances justified an injunction because the defendant insisted on repeating defamatory statements and it did not appear that damages would suffice to stop the defendant. *See, e.g., Wallace v. Cass*, No. G036490, 2008 WL 626475 (Cal. Ct. App. Mar. 10, 2008). The Court, however, has been unable to find a case recognizing a "continuing defamation" for slander, let alone a case holding that there is a "continuing defamation" exception to the application of the statute of limitations in a slander action. *See generally* 54 C.J.S. *Limitation of Actions* § 194 (2008) (continuing torts). Nor can the Court contemplate the need for such an exception.

If Ms. Rose knew of repeated slanderous statements that occurred within the limitations period, then there is no reason why those statements should not have been pled as previously noted. The trial court afforded her an opportunity to amend her complaint to be more specific, but she declined.

IV

In light of the reasoning expressed above, the Court finds it unnecessary to address the other issues raised in support of the dismissal as those questions are pretermitted. The decision of the trial court is affirmed, and this case is remanded for further proceedings. Costs of this appeal are taxed to Ms. Rose and her surety for which execution may issue if necessary.

WALTER C. KURTZ, SENIOR JUDGE

[1] Ms. Rose cites to the case of *Tennessee Eastman Corp. v. Newman*, 121 S.W.2d 130 (Tenn. Ct. App. 1938), to support this proposition. That case, however, is inapposite as it involved the question of how to apply a statute of limitations to the contraction of an occupational disease that arose over a long period of time. Occupational disease has long been recognized for valid application of the relation back doctrine since the manifestation of the disease often comes well after the first exposure. *See* 51 Am. Jur. 2d *Limitation of Actions* § 137 (1970 & Supp. 2007).